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LIABILITY OF INSOLVENT JUDGMENT DEBTORS TO ARREST AND IMPRISONMENT

UNDER THE PROVINCIAL INSOLVENCY ACT, III OF 1907 AND THE CIVIL PROCEDURE CODE ACT, V OF 1908.

It has been well said that the troubles of a plaintiff begin in this country only when he has obtained a decree, and the provisions of the Provincial Insolvency Act III of 1907 cannot be said to have mitigated them: in fact there is reason to believe that in practice the sections of Act V of 1908 and Act III of 1907 are so interpreted and worked as to afford the fraudulent debtor every facility to evade the just claims of his creditors. I propose to consider in this paper what exactly have been the changes introduced into the law by the combined effect of Acts III of 1907 and V 1908 as regards the right of the judgment-creditor to arrest and imprison the person of his judgment-debtor. I shall also notice incidentally some of the changes effected as regards the rights of the creditor to sue his debtor and to attach his properties.

The only rights which the creditor has under the Anglo-Indian laws for the recovery of his debt are the arrest and detention of the debtor in prison, and the attachment of his property. Of these the more important right is the former, as any one who has experience of the Indian debtor will testify: it is very seldom that the creditor's claim remains unsatisfied, when the debtor has been arrested and imprisoned.

In the present circumstances of the country the abolition of imprisonment for debt would be the abolition of almost the only effective remedy which creditors possess for recovering their debts. Any practitioner in the mofussil knows what amount of fraud, and chicanery are practised by the vast majority of insolvent-debtors to hood-wink their creditors. If the insolvent possesses movable property, it is easily concealed, and the creditor has no means of scenting its whereabouts, and much less of following it by judicial process; if the property be immovable, it is placed in the names of obliging friends and relations, and the unfortunate creditor has to take interminable proceedings subject to a first and a second appeal before he can get the transaction set aside.

Imprisonment is a salutary check upon such practices; most insolvents in our country have a strong objection to go to jail, and generally, when the only alternative allowed to the debtor is between imprisonment, and the settlement of the creditor's claim, he generally chooses the latter alternative. Innumerable have been the instances where the present writer has witnessed the effectiveness of arrest and imprisonment to open the purse strings of the recalcitrant debtor. Such being the case, it would be a sad mistake on the part of the legislature, if it yielded to the kind-hearted but unpractical sentimental.

ist and abolished imprisonment for debt. Any such action will strike a heavy blow at all credit in the country, and most persons would not be able to obtain money except upon security.

Analogies and historical parallels drawn from the judicial history of Western countries are of little use so long as the conditions of our country continue to differ radically from those prevailing in Europe and America.

I have felt obliged to make these few general remarks which are perhaps not quite pertinent to the subject of this paper, in view of the persistent agitation in certain quarters for the abolition of imprisonment for debt, as one of the Coronation boons.

As I shall show presently, under the combined operation of Act III of 1907 and Act V of 1908, the rights of the judgment-creditor to imprisonment of the judgment-debtor's person, and to attachment of his properties have been seriously curtailed, and it is desirable to emphasise such rights as remain, so that they too may not be overlooked.

Section 256 of the old Code (Act XIV of 1882) empowered the courts to order the immediate execution of a decree, when the amount decreed did not exceed Rs. 1,000, by the issue of a warrant directed against the person of the judgment-debtor if within the local limits of the jurisdiction of the court, or against his movable property within the same limits. But under the new Code, Order XXI, rule 11, cl. (1) immediate execution can issue *only* against the person of the judgment-debtor, and that *only* if he is within the precincts of the Court. Immediate execution by the attachment of movable property cannot be had, and arrest can be ordered only if the judgment-debtor be *within the precincts of the Court*; the amount of the decree is not however limited to Rs. 1,000 by the New Code. It will be seen how largely the powers given by section 256 of the Old Code have been cut down. The removal of the limitation of Rs. 1,000 is hardly compensation for the withdrawal of the power to order attachment of movable property, or arrest of the person if within the local limit of the jurisdiction of the Court. Under the New Code, if the judgment-debtor stands a few yards outside the Court-house, the Judge is powerless to touch him however much he may be persuaded that unless the man be arrested at once the creditor has no chance of recovering under the decree. It is to be hoped that the Rule Committee will so amend this rule as to give the Court the old powers conferred by section 256, C. P. C.

Section 61 of the New Code empowers the Local Governments with the sanction of the Governor General in Council to exempt from attachment such quantity of agricultural produce as the judgment-debtor may require for the needs of his family and for cultivation purposes until the next harvest. This is a provision in the New Code designed in the interest of the backward and improvident agricultural classes, and to preserve them from the grips of famine and the village Shylocks. It would be idle to cavil at such a beneficent provision, and I for one do hope that all Local Government will exercise in a liberal spirit the powers granted by the section.

It may be noted here in passing that while the judgment-creditor has under the Code an absolute right to attach the properties of the debtor except such as are exempted by section 60, he has no such

absolute right to arrest of the debtor's person ; it is discretionary in the Court to order arrest or not. (*vide* sections 245 B and 337 A of Act XIV of 1882, and also Order XXI, rules Nos. 37 and 40 of Act V of 1908.)

When the Court in the exercise of its discretion has ordered a warrant to issue for the arrest of the judgment-debtor and he is brought before it under arrest it has to inform him that he will be released if he will apply to be declared an insolvent, and he gives security for the purpose: *Vide* Section 53, clauses 3 and 4 of Act V of 1908. It will be noticed that the language of the Section does not cover the case of a judgment-debtor who has already petitioned to be declared an insolvent . Obviously he does not require a month's time for doing that which he has already done. The clear object of Section 55, clauses (3 and 4) is to give the debtor time to apply for the benefit of the Insolvency Acts. If he has already so applied, then that object has been served, and he is not entitled to be released. Many persons apply to be declared insolvents thinking that the *mere application* secures them immunity from arrest; as will be shown later on, it is only on adjudication that the insolvent obtains the coveted privilege. Between the date on which a man applies to be declared an insolvent, and his adjudication as such, he is liable to arrest and imprisonment for decree-debts, and this is a fact which creditors might realize more fully than they seem to do at present. The construction which I have placed on Section 55, C. P. C., is not only borne out by the clear language of the Section but is also supported by authority : *Vide Kishen Chand* v. *E. D. Sassoon & Co.*, (1910) Punjab Weekly Reporter 83.

The Provincial Insolvency Act, III of 1907—it may be noted here—confers no power on the Insolvency Court to order the release of an applicant for the benefits of insolvency, prior to adjudication when he has been arrested ; the only Section which can at all be suggested to have a bearing on the matter is Section 16, and that obviously relates to the results of an adjudication : and in fact, clause (2) (*b*) of the section which says "the insolvent, if *in prison for debt*, shall be released" implies that prior to adjudication he may be arrested and imprisoned for debt. A man detained in prison in execution of a decree can be released only under section 58, C. P. C. or under section 16 of the Provincial Insolvency Act *vide* also *In re Quarme*, 8 Mad. 503 which was a decision on section 341 of the Old Code corresponding to section 58 of the New Code. And further, there is no provision in Act III of 1907 corresponding to section 13 of the old Indian Insolvency Act (Stat. 11 & 12, Vic. C. 12) conferring upon the Insolvency Court power to grant an interim order for the protection of the insolvent from arrest. It may be noted here that section 25 of the Presidency Towns Insolvency Act, III of 1909 does not also confer upon the court the power to grant protection from arrest prior to adjudication, and in that respect varies the pre-existing law in the Presidency Towns. So far, Acts III of 1907 &V of 1908 have effected no change in the law; the rights of creditors as they existed under Act XIV of 1882 have been preserved. In one small respect they have been even enlarged. Section 349 of the Old Code empowered the Insolvency Court to order the release of a debtor after arrest and before imprisonment. Neither Act III of 1907 nor Act V of 1908 contains a similar provision and apparently therefore the Insol-

vency Court cannot now order the release of a debtor who has been arrested but not yet imprisoned.

But the cases for the applications of section 349, C. P. C. must obviously be always very rare, and creditors have not appreciably benefited by its repeal.

On adjudication as insolvent, the debtor becomes entitled to be released from prison. *Vide* section 16 clause (2) (*b*) of Act III of 1907.

It is in this respect that Act III of 1907 has effected a sudden departure from the old law; and so far as can be judged at present, the result of this change in the law has been to encourage fraudulent applications for the benefits of the Insolvency Acts.

Under Act XIV of 1882, a man was released from prison when he was declared an insolvent: *vide* section 341, cl (*e*); he could be declared an insolvent only if the court was satisfied that the statements in his application were substantially true, and that he had not been guilty of any reckless or fraudulent conduct. *Vide* section 351 of Act XIV of 1882.

But under Act III of 1907 which repeals clause (*e*) of section 341, and also section 351, *adjudication follows as a matter of course on the debtor's application.* Section 4 of the Act makes the presentation itself of a petition to be adjudged an insolvent, an act of insolvency: obviously wherefore clause (*a*) of section 14 which lays down that the court should be satisfied that the debtor is entitled to present the petition is satisfied; and section 16 makes it imperative on the court to make the order of adjudication: it says that the court *shall* make the order of adjudication whenever a petition is not dismissed under section 15, and the debtor is unable to propose any composition which shall be approved by the court, and the creditors.

But section 15, it has been held, refers only to petitions by creditors to adjudicate a debtor insolvent, and not to petitions by the debtor himself. *Vide Udai Chand Maily* v. *Ram Kumar Khara*, 7 Indian Cases, p. 394 and *Samiruddin* v. *Kader Moyee Dossee*, 7 Indian Cases 691 both of which are decisions of the Calcutta High Court: *vide Girwas Dhari* v. *Jai Narain*, 32 All. 645.

These decisions clearly lay down that the language of section 15 of Act III of 1907 could not possibly refer to the debtor's application, but was confined only to the creditor's application; adjudication under section 16 must follow as a matter of course on the debtor's application however fraudulent his conduct may have been. The case reported in 32 All. 645 affords an instance where a man was adjudicated insolvent even though his conduct towards his creditors had been grossly unfair and fraudulent.

The enormous change hereby effected in the right of the debtor to release from prison will now become at once apparent. Under the old Code he could be released when he was declared an insolvent, and that could be done only if he had acted *bona fide.* But now under Act III of 1907, he has to be released from jail when he is adjudicated an insolvent, and he has to be so adjudicated, however dishonestly he might have acted towards his creditors; no wonder if our Courts are now being flooded by insolvency applications filed by men whose only object is to obtain immunity from arrest, and creditors find that they have practically lost the only weapon they possessed to obtain payment of their dues.

I may remark here that under the Presidency Towns Insolvency Act III of 1909, it is discretionary with the Insolvency Court to grant protection or not on adjudication or to revoke a protection order once granted (*vide* section 25 of the Act). No such discretion is given to the Courts governed by Act III of 1907 (*vide* section 16 of the Act): it is a pity that section 16 of Act III of 1907 was framed on lines different from those of section 25 of Act III of 1909: the result has been certainly unfortunate to the creditors in the mufissil. It is perhaps too much to hope that section 16 of Act III of 1907 will be amended at an early date by the slow moving imperial Indian Legislature. But it is permissible to express the hope that the Insolvency Courts will always in fit cases exercise the powers granted by section 43 of Act III of 1907, to punish fraud on the part of insolvents; if the fraudulent debtor finds that, if he applies to be declared an insolvent, he runs grave risk of punishment under section 43 of Act III of 1907, he will generally prefer to pay his creditors honestly. Even in framing section 43 of Act III of 1907, the legislature has, unconsciously perhaps, cut down the rights of the creditor under the old Code: the section corresponds to section 359 of Act XIV of 1882 with some very important differences: under the latter section when fraud was proved on the part of the insolvent, the court was bound to imprison him for a period which might extend to a year when the creditor moved for it: the imprisonment could be simple or rigorous, and the order could be made only prior to the declaration of insolvency. But under section 43 of Act III of 1907 the Court is *not bound* to act but only *may* act and the imprisonment is simple: but the order may be made either *before or after the order of adjudication.* But after adjudication, the conduct of the insolvent comes before the Court only when he applies for an order of discharge, and most insolvents who have acted fraudulently do not care to apply for this order, but are content with the adjudication which gives them immunity from arrest. Seeing that section 43 of Act III of 1907 generally corresponds to section 359 of the Old Code, the rules framed by the High Court under section 51 of the Act might well make it imperative upon the Subordinate Courts to take under section 14 full evidence of the dealings of the insolvent, before adjudication, and to decide upon the advisability of action under section 43 prior to adjudication: and of course merely because the Court did not take action under section 43 of the Act prior to adjudication, it will not be debarred from subsequently putting that section in force if, upon the later proceedings, the receiver's report, the ends of justice require the application of the section to the particular insolvent.

It cannot be denied that Act III of 1907 provides a systematic machinery for the realization and distribution of the insolvent's estate, where previously there was none.

But the changes in the law to which I have drawn attention appear to be of doubtful wisdom, and it is to be hoped that the Legislature will step in and bring the Provincial Insolvency Act III of 1907 into conformity with the Presidency Towns Insolvency Act III of 1909 as regards the various points dealt with above.

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High Court Vakil.

SYNOPSIS OF CASE LAW (INDIAN).

British and Foreign Marine Insurance Co. Ld. v. *India General Steam Navigation and Railway Co. Ld.*, 38 C. 50.

Where common carriers are sued to recover damages for goods lost, notice of such loss must be given to the carrier, before suit, under Section 10 of the Carrier's Act.

Grey v. *Charusila Dasi*, 38 C. 53.

The Official Trustee is not entitled, under the Official Trustee's Act, to obtain a grant of probate by virtue of his official capacity.

Gobind v. *Harihar*, 38 C. 60.

It is open to one holding several mortgages on the same property to sue on the earlier mortgages leaving alone his claims under the later ones.

THE WEEK'S CASES.

30th October, 1911.

Benson, J.

Cr. A. 194 of 1911.

Where the lower court in effect improperly shuts out evidence, the case should be sent down for additional evidence to be taken on the point that might have been otherwise proved.

Cr. R. C. 444 of 1911.

Where the owner of a land goes armed with a number of people to his plot for resisting the interference of the villagers, they cannot be convicted of having unlawfully assembled.

1st November, 1911

Benson, J. and Sundara Iyer, J.

S. A. 753 of 1910.

Held following the proceedings of the late Sudder Court dated 1856 that one of the incidents of what is known as *karankari tenure* in Malabar is that it is inalienable. The malchartdar from the jenmi was *held* entitled to recover possession from the alienee from the karankari holders.

S. A. 1039 of 1910.

A *santhi* (Puja maker) of a temple was paid his wages from the income of certain lands demised to him on kanom. *Held* that the said arrangement afforded no ground for the *santikanomdar* to resist the jenmi's suit for redemption of the kanom. His right to get reasonable wages from the jenmi might remain unaffacted. But the suit for redemption of the lands was decreed.

2nd November, 1911.

Spencer, J.

Cr. A. 270 of 1911.

Where a minor girl applies to the temple authorities to be admitted to the class of *Devadasies* attached to the temple and where the adoptive mother of the girl also supports the application, the mother is guilty under section 372, I. P. C. *Held* also it was on the accused to prove *bona fide* mistake of fact under section 79, I. P. C., failing which conviction must follow.

3rd November, 1911.

Sundara Iyer, J.

S. A. 649 and 650 of 1911.

A *Sthani* is entitled to create a charge on the *sthanam* properties for meeting expenses of the (*pindam and masam*) funeral ceremonies of the previous *sthani* in case the current income from the *sthanam* properties is not enough to enable him to perform the said ceremonies in the way in which they were customarily performed without incurring a further debt.